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LEGAL MAXIMS AND OTHER GENRES OF LITERATURE IN ISLAMIC JURISPRUDENCE

*Mohammad Hashim Kamali**

Introductory Remarks

This essay introduces the legal maxims of *fiqh* (*qawā'id kulliyya fiqhiyya*) as a distinctive genre of *fiqh* literature side by side with three other related areas of development, namely *al-d'awābiṭ* (rules controlling specific themes), *al-furūq* (distinctions and contrasts), and *al-naẓariyyāt al-fiqhiyya* (general theories of *fiqh*). Developed at a later stage, these genres of *fiqh* literature seek, on the whole, to consolidate the vast and sometimes unmanageable juris corpus of *fiqh* into brief theoretical statements. They provide concise entries into their respective themes that help to facilitate the task of both the students and practioners of Islamic law. Legal maxims are on the whole inter-scholastic, and disagreement among the legal schools is negligible on them. Legal maxims also closely relate to the *maqāṣid*, and provide useful insights into the goals and purposes of Sharī'a (*maqāṣid al-sharī'a*), so much so that some authors have subsumed them under the *maqāṣid*. Yet, for reasons that will presently be explained, legal maxims represent a late development in the history of Islamic jurisprudence. The discussion which follows begins with introductory information on the basic concept and scope of legal maxims. This is followed by a more detailed account of the leading five maxims which the jurists have seen as representative of the entire field, saying that all the other maxims can be seen as a commentary on these five. The discussion continues by looking into the history of legal maxims, and then provides an account of their subsidiary themes, namely the *ḍawābit*, the *furūq*, the resemblances and similitudes (*al-ashbāh wa'l naẓā'ir*), and finally the *naẓariyyāt*.

There is a lacuna in the available English literature on Islamic law that cries to be filled. Except for a few cursory references in the works

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of Joseph Schacht and three other articles,[1] the present writer has not seen any substantive coverage of legal maxims in the English language. Unlike the existing works in English that tend to be historical, the present essay focuses on a juridical coverage of legal maxims, and traces salient developments of its allied genres of literature. No one has, to the best of the present writer's knowledge, placed the legal theories of Islamic law (*nazariyyāt*) and the *fiqh* encyclopedias in context with the legal maxims. There is also a certain ambiguity and convergence in some of the existing works between *qawāʿid* and the goals and objectives (*maqāṣid*) of Sharīʿa, both in the Arabic and English works, which call for clarification. This has also been attempted in our discussion below.

Legal maxims as a distinctive area of *fiqh* studies has gained considerable recognition, in recent decades, in the legal studies programmes of Islamic universities and institutions of higher learning. Many traditional Arabic texts on the subject have been published for the first time, and a number of modern works added, for basically two reasons. One is the somewhat excessive attention to detail in the *fiqh* texts and difficulty of access due to poor classification, and the refreshing contrast one finds in the synoptic summaries of legal principles in the *qawāʿid*, especially for purposes of teaching. The other reason is that, unlike the wider *fiqh* literature that bears the vestiges of the imitative tradition of *taqlīd*, legal maxims are not hampered by that factor as much. *Taqlīd* finds its foothold mainly in concretised detail, but, since legal maxims consist mainly of abstract ideas, they are not particularly affected by the legacy of *taqlīd*, and can thus be more readily utilised as aids in the renewal of *fiqh* and contemporary *ijtihād* (independent reasoning).

The renewed interest in legal maxims is also informed by a parallel revival of interest, among teachers and researchers of Sharīʿa, in the *maqāṣid al-Sharīʿa*, goals and objectives of Islamic law. Since legal maxims bear close affinity to the *maqāṣid*, they tend to provide an efficient entry into the understanding of the *maqāṣid al-Sharīʿa*.

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[1] Joseph Schacht, *An Introduction to Islamic Law*, Oxford: Clarendon Press, 1964, mentions *Qawāʿid Fiqhiyya* in passing and refers to them in his glossary as "rules, the technical principles of positive law, subject of special works" (p. 114, 300); Wolfhart Heinrichs, "Structuring the Law: Remarks on the *Furuq* literature" in Ian Richard Netton (ed.), *Studies in Honour of Clifford Edmund Bosworth*. Vol. I: *Hunter for the East: Arabic and Semetic Studies*, Leiden: Brill, 2000, 332-344; Idem, "*Qawāʿid* as a Genre of Legal Literature" in Bernard Weiss, ed., *Studies in Islamic Legal Theory*, Leiden: Brill 2002, 364-385. This last article is useful on bibliographic information, related Arabic terminology, as well as classification of legal maxims. A more recent addition is

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The upsurge of interest in both the *maqāṣid* and legal maxims is underscored, in turn, by a certain awareness that the legal theory of *uṣūl al-fiqh* has somehow fallen short of meeting the demands of contemporary *ijtihād*. Ever since Jamal al-Dīn al-Afghanni (d. 1898) and his disciple Muhammad ʿAbduh's (d. 1905) clarion call for the revival of *ijtihād*, Muslim scholars have continued to emphasise the need for re-interpretation and reform of aspects of Sharīʿa through *ijtihād*. The twentieth century marked a general disaffection with *taqlīd*, and witnessed the revival of *ijtihād* through statutory legislation, *fatwā* and juristic research by individuals, committees and institutions. Codification and partial reforms of the Islamic law of transactions in the renowned Ottoman *Mejelle* (1876) was followed, in the twentieth century, by legislative reforms of Sharīʿa family law, and the revival in recent decades of the Sharīʿa law of transactions (*muʿāmalāt*) in Islamic banking and finance. Yet, despite these achievements, and the rich experiences they have generated, Muslim scholars have spoken at length that the legal theory of *uṣūl al-fiqh* has not adequately responded to the demands of renewal and *ijtihād* in the era of statutory legislation. Questions have arisen, and explanations offered, yet the decades of Islamic resurgence and Islamisation of law and government have left Muslims with the impression that *ijtihād* has not become an engaging theme of legislation. The present writer has elsewhere addressed some of these issues, and it is not his purpose to delve into them here.[2] The point to be made, however, is that the legal theory of *uṣūl al-fiqh* is now studied mainly as an academic discipline that falls short of meeting the demands of *ijtihād*, or of neo-*ijtihād*, as per the late Noel Coulson, in the era of statutory legislation. Muslim scholars have consequently taken greater interest in the study of the *maqāṣid al-Sharīʿa*, a somewhat neglected chapter that was not even included in the conventional coverage of *uṣūl al-fiqh*, but which is now seen as a more dynamic tool of greater relevance to the concerns of *ijtihād*. This endorses further the renewed interest in the *qawāʿid*, which bear a close affinity to the *maqāṣid al-Sharīʿa*.

Khaleel Mohammed, "The Islamic Law Maxims," *Islamic Studies* 44, no. 2 (1426/2005), 191-209.

[2] See Mohammad Hashim Kamali, "Sharīʿah and the Challenge of Modernity," *Journal of the Institute of Islamic Understanding Malaysia* (Kuala Lumpur) vol. I (1994), 1-27, reprinted in the *Islamic University Quarterly* (London) Vol. 2, no. 1 (1995), 10-37; Idem, "Fiqh and Adaptation to Social Reality," *The Muslim World*, 86 (1996), 62-85; "Methodological Issues in Islamic Jurisprudence," *ALQ* 11 (1996) 62-85; and "Issues in the Legal Theory of Usul and Prospects for Reform," *Islamic Studies* 41 (2001), 1-21.

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Concept and Scope

Legal maxims are theoretical abstractions in the form, usually, of short epithetical statements that are expressive, often in a few words, of the goals and objectives of Sharīʿa. They consist mainly of statements of principles that are derived from the detailed reading of the rules of *fiqh* on various themes. The *fiqh* has generally been developed by individual jurists in relationship to particular themes and issues in the course of history, and differs, in this sense, from modern statutory law rules, which are concise and devoid of detail. The detailed expositions of *fiqh* in turn enabled the jurists, at a later stage of development, to reduce them into abstract statements of principles. Legal maxims represent the culmination, in many ways, of cumulative progress which could not have been expected to take place at the formative stages of the development of *fiqh*. The actual wording of the maxims is occasionally taken from the Qurʾān or hadith, but are more often the work of leading jurists, that have subsequently been refined by other writers throughout the ages. It has often been a matter of currency and usage that the wording of certain maxims have been taken to greater refinement and perfection.

Unless they affirm and reiterate a ruling of the Qurʾān or Sunna, legal maxims as such do not bind the judge and jurist, but they do provide a persuasive source of influence in the formulation of judicial decisions and *ijtihād*. Legal maxims, like legal theories, are designed primarily for better understanding of their subject matter, rather than for enforcement. A legal maxim differs, however, from a legal theory in that the former is limited in scope, and does not seek to establish a theoretically self-contained framework over an entire discipline of learning. A theory of contract, or a constitutional theory, for example, is expected to offer a broad, coherent, and comprehensive entry into its theme. We may have, on the other hand, numerous legal maxims in each of these areas.

Legal maxims are of two types. Firstly, those which rehash or reiterate a particular text of the Qurʾān or Sunna, in which case they carry greater authority. "Hardship is to be alleviated—*al-mashaqqa tajlub al-tasysīr*", for example, is a legal maxim of *fiqh* which merely paraphrases parallel Qurʾānic dicta on the theme of removal of hardship (*raf ʿal-araj*). Another legal maxim which provides: "actions are judged by their underlying intentions (*innama al-aʿmāl bi al-niyyāt*)" reiterates the exact wording of a renowned ḥadīth. In his *Kitāb al-Ashbāh wa'l-Nazā'ir* (resemblances and similitudes), which is a collection of legal maxims, Jalāl al-Din al-Suyūṭi (d. 911/1505) has, in numerous instances, identified the origin, whether the Qurʾān, Sunna or the precedent of Companions, of the legal maxims he has recorded.

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The second variety of legal maxims are those which are formulated by the jurists. Despite the general tendency in legal maxims to be inter-scholastic, jurists and schools are not unanimous, and there are some on which the *madhāhib* have disagreed. Legal maxims such as "certainty may not be overruled by doubt" or "*ijtihād* does not apply in the presence of *naṣṣ*", or "preventing an evil takes priority over securing a benefit", or "absence of liability (i.e. innocence) is the normative state" are among the well-known maxims on which there is general agreement.

Legal maxims represent an important area of *fiqh* literature, as their study imparts strategic knowledge of their subject matter, and helps the reader gain insight into the general character and attributes of the Sharīʿa. They are particularly useful and inspiring in the vision they impart for the search particularly of new solutions through *ijtihād*.

Legal maxims are different from *uṣūl al-fiqh* (sources of *fiqh*) in that the maxims are based on the *fiqh* itself and represent rules and principles that are derived from the reading of the detailed rules of *fiqh* on various themes. The *uṣūl al-fiqh* is concerned, on the other hand, with the sources of law, rules of interpretation, methodology of legal reasoning, meaning and implication of command and prohibition, and so forth. A maxim is defined as "a general rule which applies to all or most of its related particulars".[3] This definition is attributed to Tāj al-Dīn al-Subki (d. 771/1370), which is generally adopted and followed by subsequent authors. Legal maxims are usually articulated in incisive literary style. It is due partly to the abstract and generalised terms of their language that legal maxims are hardly without some exception to which they do not apply even if their wording might suggest otherwise. Some would even say that legal maxims are in the nature of probabilities (*aghlabiyya*) that may or may not apply to cases to which they apparently apply. According to al-Shāṭibi (d. 790/1388), exceptions do not invalidate a general rule, because the stray particulars do not form a second general rule in opposition to the first.[4] Some writers have noted, however, that in the legal field, a maxim is only predominantly valid, whereas in certain other fields, such as grammar and *uṣūl al-fiqh*, it is said to be generally valid almost as a matter of certainty. We shall presently note, however, that this is rather a weak opinion.

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[3] Cf. Tāj al-Dīn ʿAbd al-Wahhāb al-Subki, *Al-Ashbah Waíl-Nazāíir*, ed. ʿAli Ahmad Ibn ʿAbd al-Mawjūd and ʿAli Muhammad ʿIwad. 2 Vol. Beirut: Dar al-Kutub al-ʿIlmiyya, 1411/1999, 1,11. Subhi Mahmassani, *Falsafat al-Tashrīʿ fil-Islam: The Philosophy of Jurisprudence in Islam*. Eng. Trans. Farhat J. Ziadeh, Leiden: E.J. Brill 1961, p. 151; Shaykh Muhammad al-Zarqa, *Sharh al-Qawāʿid al-Fiqhiyya*, 3rd edn. Damacus: Dar al-Qalam, 1414/1993, p. 33.

[4] Abu Ishaq Ibrahim al-Shatābi, *al-Muwafaqat fi Usul-Aḥkām*, 11, 83-84.

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It is due to their versatility and comprehensive language that legal maxims tend to encapsulate the broader concepts and characteristics of the Sharī'a. They tend to provide a bird's-eye-view of their subject matter in imaginative ways without engaging in burdensome details.

A legal maxim is reflective, in the meantime, of a consolidated reading of *fiqh*, and it is in this sense different from what is known as *al-ḍābiṭa* (lit. a controller), which is somewhat limited in scope, and controls the particulars of a single theme or chapter of *fiqh*. *Ḍābiṭa* is thus confined to individual topics such as cleanliness (*ṭahāra*), maintenance (*nafaqa*), paternity, and fosterage (*al-riḍā'*), and as such does not apply to other subjects. An example of a *ḍābiṭa* is: "marriage does not carry suspension"; and, with reference to cleanliness: "when the water reaches two feet, it does not carry dirt".[5] An example of a legal maxim, on the other hand, is "the affairs of imam concerning his people are judged by reference to *maṣlaḥa*" (*amr al-imam fi shu'ūn al-ra'iyya manūṭ bi'l-maṣlaḥa*), as the theme here is more general, without any specification of the affairs of the people or the activities of the imam. Similarly, when it is said, in another maxim, that "acts are judged by their underlying intentions", the subject is not specified, and it is, as such, a maxim (*qā'ida*), and not a *ḍabiṭa* of a specified import. Having drawn a distinction between *ḍabiṭa* and *qā'ida*, we note, however, that legal maxims also vary in respect of the level of abstraction, and the scope which they cover. Some legal maxims are of general import, whereas others might apply to a particular area of *fiqh*, such as the *'ibādāt*, the *mu'āmalat*, contracts, litigation, court proceeding, and so forth. Some of the more specific maxims may qualify as a *ḍabiṭa* rather than as a maxim proper, as the distinction between them is not always clear, nor regularly observed.

The Five Leading Maxims

The most comprehensive and broadly-based of all maxims are placed under the heading of "*al-qawā'id al-fiqhiyya al-aṣliyya*" or the normative legal maxims that apply to the entire range of *fiqh* without any specification, and the *madhāhib* are generally in agreement over them. Maxims such as "harm must be eliminated" (*al-ḍararu yuzāl*) (*The Mejelle*, Art. 20) and "acts

[5] Cf. 'Abd al-Raḥmān al-Ṣābūni, et al., *al-Madkhal al-Fiqhi wa Tārīkh al-Tashri' al-Islami*, Cairo: Maktaba Wahba, 1402/1982, p. 389.

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are judged by their goals and purposes" (*al-umūr bi-maqāṣidihā*) (*The Mejelle*, Art. 2), belong to this category of maxims.

The early ulama have singled out five legal maxims as the most comprehensive of all, in that they encompass the essence of the *Sharī ʿa* as a whole, and the rest are said to be simply an elaboration of these. Two of these have just been quoted. The other three:

- "Certainty is not overruled by doubt" (*al-yaqīn lā yazūlu bi'l-shakk*) (*The Mejelle*, Art. 4);
- "hardship begets facility" (*al-mashaqqatu tajlub al-taysīyr*) (*The Mejelle*, Art. 17);
- "custom is the basis of judgment" (*al-ʿadatu muḥakkamtun*) (*The Mejelle*, Art. 36).

Each of these will be discussed in some detail in the following pages. Yet, it will be noted in passing that reducing the number of legal maxims to a minimum has invoked criticism from al-Subki, who said that this cannot be done without engaging in artificiality and compromise. In this connection al-Subki is noted to have been particularly critical of ʿIzz al-Din ʿAbd al-Salām's (d. 660/1262) attempt to reduce the whole of the law to almost one principle, namely that "prevention of harm takes priority over securing of benefits—*dar' al-mafāsid awlā min jalb al-manāfi*". This kind of approach, according to al-Subki, simply ignores the specificity and character of the *qawāʿid*.[6]

The first of the leading five maxims may be illustrated with reference to the state of ritual purity (*ṭahāra*). If a person has taken ablution (*wuḍū'*), and knows that with certainty, but doubt occurs to him later as to the continuity of his *wuḍū'*, the certainty prevails over doubt, and his *wuḍū'* is deemed to be intact. According to another, but similar maxim, "knowledge that is based in certainty is to be differentiated from manifest knowledge that is based on probability only—*yufarraqu bayn al-ʿilmi idhā thabata ẓāhiran we baynahu idhā thabata yaqīnan*". For example, when the judge adjudicates on the basis of certainty, but later it appears that he might have erred in his judgment, if his initial decision is based on clear text and consensus, it would not be subjected to review on the basis of a mere probability.[7] Similarly, a missing person (*mafqūd*) of unknown whereabouts is presumed to be alive, as this is the certainty that is known about him

[6] Cf. Heinrichs "Qawāʿid as a Genre of Legal Literature," n. 1, 372.

[7] Muhammad ʿAmīm al-Ihsan al-Barikati. *Qawāʿid al-Fiqh*, Dacca (Bangladesh): Zeeco Press, 1381/1961, pp. 142-143.

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before his disappearance. The certainty here shall prevail, and no claim of his death would validate distribution of his assets among his heirs until his death is proven by clear evidence. A doubtful claim of his death is thus not allowed to overrule what is deemed to be certain.[8]

Other supplementary maxims of a more specified scope that are subsumed by the maxim under review include the following: "The norm (of Sharīʿa) is that of non-liability" (*al-aṣlu barā'at al-dhimma*). This is an equivalent, although perhaps a more general one, to what is known as the presumption of innocence. This latter expression implies that it relates primarily to criminal procedure, whereas the non-liability maxim of *fiqh* also extends to civil litigation, and to religious matters generally. The normative state, or the state of certainty, for that matter, is that people are not liable, unless it is proven that they are, and until this proof is forthcoming, to attribute guilt to anyone is treated as doubtful. Certainty can, in other words, only be overruled by certainty, not by doubt. Another supplementary maxim here is the norm that presumes the continued validity of the *status quo ante* until we know there is a change: "The norm is that the status quo remains as it was before" (*al-aṣlu baqā' mā kāna ʿalā mā kāna*), and it would be presumed to continue unless it is proven to have changed. An example of this is the wife's right to maintenance which the *Sharīʿa* has determined; when she claims that her husband failed to maintain her, her claim will command credibility. For the norm here is her continued entitlement to maintenance for as long as she remains married to him. Similarly, when one of the contracting parties claims that the contract was concluded under duress, and the other denies this, this latter claim will be upheld because absence of duress is the normal state, or status quo, which can only be rebutted by evidence.[9] According to yet another supplementary maxim: "The norm in regard to things is that of permissibility" (*al-aṣlu fi'l-ashyā' al-ibāḥah*). Permissibility is, in other words, the natural state and will therefore prevail until there is evidence to warrant a departure from that position. This maxim is also based on the general reading of the relevant evidence of the Qur'ān and Sunna. Thus, when we read in the Qur'ān that God Most High "has created all that is in the earth for your benefit" (2:29), and also the hadith: "whatever God has made *ḥalāl* is *ḥalāl* and whatever that He rendered *ḥaram* is *ḥaram*, and whatever concerning which He has remained silent is forgiven"—the

[8] Cf. Zarqā, *Sharḥ al-Qawāʿid*, n. 1, p. 382.
[9] Ṣābūni, *al-Madkhal*, n. 5, p. 389.

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conclusion is drawn that we are allowed to utilize the resources of the earth for our benefit and, unless something is specifically declared forbidden, it is presumed to be permissible.

"*Al-ḍararu yuzāl*—harm must be eliminated" is a derivative, in turn, of the renowned hadith "*la ḍarara wa lā ḍirār*—let there be no infliction of harm nor its reciprocation". This hadith has also been adopted into a legal maxim in precisely the same words as the hadith itself.[10] A practical illustration of this hadith-cum-legal maxim is as follows: Suppose that someone opens a window in his house which violates the privacy of his neighbour, especially that of its female inhabitants. This is a harmful act which should not have been attempted in the first place, and may call for legal action and remedy. But, it would be contrary to the maxim under review for the neighbour to reciprocate the harmful act by opening a window in his own property that similarly violates the privacy of the first neighbour.

A similar manifestation of the maxim "*al-ḍararu yuzāl*—harm must be eliminated" is the validation of the option of defect (*khiyār al-ʿayb*) in Islamic law, which is designed to protect the buyer against harm. Thus, when a person buys a car and then discovers that it is substantially defective, he has the option to revoke the contract. For there is a legal presumption under the Sharīʿa that the buyer concluded the contract on condition that the object of the sale was not defective.

The hadith of "*lā ḍarar*" has given rise to a number of additional maxims on the subject of *ḍarar*. To quote but a few, it is provided in a maxim: "A greater *ḍarar* is eliminated by (tolerating) a lesser one—*al-ḍarar al-ashadd yuzālu bi'l-ḍarar al-akhaff*." For example, the law permits compelling the debtor, or one who is responsible to support a close relative, to fulfill their obligations, and give what they must, even if it means inflicting some hardship on them. According to another maxim, "harm may not be eliminated by its equivalent—*al-ḍarar la yuzālu bi-mithilih*" (*The Mejelle*, Art. 25). This may also be illustrated by the example we just gave of "*la ḍarara wa lā ḍirār*".

Another maxim on *ḍarar* has it that "harm cannot establish a precedent—*al-ḍararu lā yakūnu qadīman*." Lapse of time, in other words, cannot justify tolerance of a *ḍarar*. For example, waste disposal that pollutes a public passage should be stopped regardless as to how long it has been

[10] *The Mejelle*: Being an English Translation of *Majallah el-Ahkam el-Adliya*, trans. C.R. Tyser, reprint, Lahore, Law Publishing Co. 1967, Art. (19).

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tolerated. And then, also, that "harm is to be eliminated within reasonable bounds—*al-ḍarar yudfaʿu bi-qadr al-imkān*." For example, if a thief can be stopped by the blow of a stick, striking him with a sword should not be used to attempt to obstruct him. According to yet another maxim, "harm to an individual is tolerated in order to prevent a harm to the public—*yuta ḥammalu al-ḍarar al-khāṣ li-dafʿ al-ḍarar al-ʿām*" (*The Mejelle*, Art. 26).[11] For example, the law permits interdiction on an adult and competent person, including an ignorant physician, or a fraudulent lawyer, in order to protect the public, notwithstanding the harm this might inflict on such individuals.

It is stated in the *Mejelle* that legal maxims are designed to facilitate a better understanding of the Sharīʿa, and the judge may not base his judgment on them unless the maxim in question is derived from the Qurʾān or Hadith, or supported by other evidence.[12] This is in contrast, however, with the view of Shihāb al-Dīn al-Qarāfi (d. 682/1281), who held that a judicial decision is reversible if it violates a generally accepted maxim.[13] The ulama have generally considered the maxims of *fiqh* to be significantly conducive to *ijtihād*, and they may naturally be utilized by the judge and *mujtahid* as persuasive evidence; it is just that they are broad guidelines, whereas judicial orders need to be founded in specific evidence that is directly relevant to the subject of adjudication. Since most of the legal maxims are expounded in the form of generalised statements, they hardly apply in an exclusive sense, and often admit exceptions and particularisation. Instances of this were often noted by the jurists, especially in cases where a particular legal maxim failed to apply to a situation that evidently fell within its ambit, who then sometimes attempted to formulate a subsidiary maxim to cover those particular cases.

Legal maxims were developed gradually, and the history of their development in a general sense is parallel with that of the *fiqh* itself. More specifically, however, these were developed mainly during the era of imitation (*taqlīd*), as they are in the nature of an extraction (*takhrīj*) of guidelines from the detailed literature of *fiqh* that were contributed during the first three centuries of Islamic scholarship, known as the era of *ijtihād*.[14]

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[11] See also ʿAmīm al-Barikati, *Qawāʿid al-Fiqh* n. 7, p. 88 and 139.

[12] Cf. Mahmassani, *Falsafat*, n. 1, p. 152; Zarqā n. 1, *Sharḥ al-Qawāʿid*, p. 34.

[13] Shihāb al-Dīn al-Qarāfi, *Kitab al-Furuq*, Cairo: Maṭbaʿa Dar al-Ihyʾ al-Kutub al-ʿArabiyyam 1386H, vol. 4, p. 40; see also Jamal al-Dīn ʿAṭiyya, *al-Tanzīr al-Fiqhi*, Doha (Qatar) n.d., 1407/1989, p. 208.

[14] Cf. Ṣābūni, *al-Madkhal*, n. 5 p. 398.

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The hadith of *lā ḍarār* has also been used as the basic authority for legal maxims on the subject of necessity (*ḍarūra*). I refer here to only two, the first of which proclaims that "necessity makes the unlawful lawful" (*al-ḍarūrāt tubīḥ al-maḥẓūrāt*).[15] It is on this basis that the jurists validate the demolition of an intervening house in order to prevent the spread of fire to adjacent buildings, just as they validate dumping of the cargo of an overloaded ship in order to prevent danger (or *ḍarar*) to the lives of its passengers. Another maxim on necessity declares that "necessity is measured in accordance with its true proportions" (*al-darūrat tuqdaru bi-qadrihā*). Thus, if the court orders the sale of the assets of a negligent debtor in order to pay his creditors, it must begin with the sale of his movable goods—if this would suffice to clear the debts—before ordering the sale of his real property.[16]

The maxim "hardship begets facility" (*al-mashaqqatu tajlub al-taysīr*) is, in turn, a rehash of the Qur'ānic āyāt: "God intends for you ease and He does not intend to put you in hardship" (2:185), and "God does not intend to inflict hardship on you" (5:6), a theme which also occurs in a number of hadiths. The jurists have utilised this evidence in support of the many concessions that are granted to the disabled and the sick in the sphere of religious duties, as well as civil transactions. With reference to the option of stipulation (*khiyār al-sharṭ*), for example, there is a hadith which validates such an option for three days, that is, if the buyer wishes to reserve for himself this amount of time before ratifying a sale. The jurists have then reasoned that this period may be extended to weeks, or even months, depending on the type of goods that are bought, and the need of the buyer, who may need a longer period for investigation. According to another, but still related, legal maxim "*idhā ḍāq al-amru ittasaʿa*—an opening must be found when matters become exceedingly difficult". For example, a debtor who accedes to his obligation, but is unable to pay, must be given time, if this would enable him to clear his debt. The same logic would validate, on the other hand, killing a violent thief if a lesser threat or action is not likely to put a stop to his evil. The judge may likewise admit the best available witnesses, even if some doubt as to their uprightness (*ʿadālah*) persists, if this is deemed to facilitate justice in stressful situations. The maxim under review is also related to the

[15] *The Mejelle* n. 10, (Art. 17); see also Zarqā, *Sharḥ al-Qawāʿid*, n. 3, p. 157.
[16] Cf. al-Ṣābūni, *al-Madkhal*, n. 5 p. 100.

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subject of necessity, and its leading maxim, as quoted above, that "necessity makes the unlawful lawful".[17]

The maxim "*al-umūr bi-maqāṣidihā*—acts are judged by their goals and purposes" is also a rehash of the renowned hadith "acts are valued in accordance with their underlying intentions" (*innama al-aʿmāl bil-niyyāt*). This is a comprehensive maxim with wide implications that the ulama have discussed in various areas, including devotional matters, commercial transactions, and crimes. The element of intent often plays a crucial role in differentiating, for example, a murder from an erroneous killing, theft from an inculpable appropriation of property, and the figurative words that a husband may utter in order to conclude the occurrence, or otherwise, of a divorce. To give another example, when someone takes possession of the lost property of another (*al-luqṭa*), he could qualify either as a trustee (*amīn*) if he intends to return it to its owner, or as a usurper (*ghāṣib*) if he intends to unlawfully keep it. Similarly, when a person lays a net, or digs a pit, in his own property, and a bird or animal is consequently caught, the game would belong to him if he intended to hunt, but if the net was laid in order to prevent entry, or the pit was intended for some drainage purposes, then the game caught therein is not presumed to have fallen into his ownership, and it would consequently be lawful for others to take.[18]

The maxim "custom is the basis of judgment" is again based on the statement of the Companion, Abdullah Ibn Masʿūd: "what the Muslims deem to be good is good in the eyes of God". This is sometimes identified as an elevated (*marfuʿ*) hadith, as the Prophet had, himself, on numerous occasions upheld customary practices of the Arabian society. The court is accordingly authorised to base its judgment on custom in matters which are not regulated by the text, provided, that the custom at issue is current, predominant among people, and is not in conflict with the principles of Sharīʿa. A custom which runs contrary to Sharīʿa, and reason, is therefore precluded. Several other subsidiary maxims have been derived from this, including the one which proclaims "what is determined by custom is tantamount to a contractual stipulation" (*al-maʿruf ʿurfan ka'l-mashrūṭ sharṭan*) (*The Mejelle*, Art. 42). Thus, when the contract does not regulate a matter which is otherwise regulated by custom, the customary rule would be presumed to apply. Similarly, when someone rents a house or

[17] Cf. Zarqā, *Sharḥ al-Qawāʿid*, n. 3, pp. 163-64.
[18] Id., p. 49.

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a car, he should use it according to what is customary and familiar, even if the detailed manner of its use is not regulated in the contract. To give yet another example, when the father of a bride gives her a wedding gift of, say, a set of furniture, and later claims that it was a temporary loan (*ʿāriya*), and not a gift (*hibba*), and there is no evidence to prove the claim, credibility would be given to the prevailing custom. If it is found that the father customarily gave such items as gifts on such occasions, it would be counted as a gift, even if the father claimed otherwise.[19]

A general custom of unrestricted application qualifies as a basis of judgment and many jurists have accorded the same value to customs that are confined to a particular area and locality. Technically, however, only the general custom has the strength to take priority over normal rules, or the rulings of analogy (*qiyās*).[20] Custom has thus validated the plucking of ripened fruit that is likely to go to waste, should there be no impediment, and no one is there to collect it. This is contrary to normal rules, which do not permit taking the property of others. Similarly, people tend to weigh and measure goods and commodities differently in different places, and customary practices concerning them will be recognised by the courts in the locality concerned, even if such practices happen to be contrary to normal rules.[21]

According to a parallel, although slightly differently worded, legal maxim, "the usage of people is a proof that must be followed—*istiʿmāl al-nāsi ḥujjatun yajib al-amalu bihā*".[22] The word '*istiʿmāl*' in this maxim is synonymous with *ʿādah* and this maxim is said to contemplate linguistic usages that concern the meaning of words, whether literal, methaphorical, judicial, etc. Which of these meanings, if any, should prevail in the event of a conflict arising between them is of concern to this maxim. The first of the two maxims under review, (i.e., *al-ʿādatu muḥakkamatun*), is thus concerned with actual practices, whereas the second mainly relates to the linguistic usages of words and their meanings. According to yet another supplementary maxim, "the literal is abandoned in favour of the customary—*al-ḥaqīqatu tutraku bi-dalālat al-ʿādah*" (*The Mejelle*, Art. 40). For example, when someone takes an oath that he will never "set foot" in so-and-so's house, but then he only technically sets his foot in that house

[19] Cf. Zarqā, *Sharḥ al-Qawāʿid*, n. 3, p. 238; al-Barikati, *Qawāʿid*, n. 7, p. 125.

[20] See for detail M.H. Kamali, *Principles of Islamic Jurisprudence*, Cambridge: The Islamic Text Society, 3rd revised and enlarged ed., 2003. Ch. 14 on Custom, 369-384.

[21] Cf. Zarqā, *Sharḥ al-Qawāʿid*, n. 1, p. 221.

[22] The *Mejelle*, n. 10, (Art. 37).

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without entering into it, he will not be liable to an expiation (*kaffāra*) for breaking an oath. This is because, customarily, the expression means entering the house, and not the literal meaning that it conveys.[23]

The maxim which declares "profit follows responsibility" (*al-kharāj bil-ḍamān*)[24] is a direct rendering of a hadith in those identical words. Thus, the yield of trees and animals, etc., belongs to those who are responsible for their upkeep and maintenance. Suppose that person A, who has bought a machine, decides to return it to the seller when he finds it to be defective. Suppose, also, that the machine has yielded profit during the interval when it was with A. Does A have to return to the seller the profit he made through the use of the machine? By applying the legal maxim before us, the answer is that A may keep the profit, as the machine was his responsibility during the interval, and he would have been responsible for its destruction and loss before he returned it to the seller.[25]

The maxim that a ruling of "*ijtihād* is not reversed by its equivalent" (*al-ijtihād la yunqaḍ bi-mithlih*)[26] has, in turn, been attributed to a statement of the Caliph ʿUmar Ibn al-Khaṭṭāb, which is also upheld by the consensus of the Companions. Supposing a judge has adjudicated a dispute on the basis of his own *ijtihād*, that is, in the absence of a clear text to determine the issue. Then he retires, and another judge, whether of the same rank or at the appellate level, looks into the case, and the latter's *ijtihād* leads him to a different conclusion on the same issue. Provided that the initial decision does not violate any of the rules that govern the propriety of *ijtihād* a mere difference of opinion on the part of the new judge, or a different *ijtihād* he might have attempted, does not affect the authority of the initial *ijtihād*, simply because one ruling of *ijtihād* is not reversible by another ruling of *ijtihād*. It is further noted that the Caliph ʿUmar had ruled, in one or two similar cases, contrary to what his predecessor Abu Bakr had done, but he did not attempt to declare Abu Bakr's ruling invalid, on the analysis that his own *ijtihād* was not necessarily better than that of Abu Bakr.[27]

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[23] Cf. Kamali, *Jurisprudence*, p. 373.

[24] *The Mejelle*, n. 10, (Art. 85). Another substantially similar maxim, albeit in different words, *is al-ghanamu bi'l-gharam*-liability for loss proceeds from one's entitlement to profit." Cf. al-Barikati, *Qawāʿid al-Fiqh*, n. 7, p. 94.

[25] Cf. Zarqā, *Sharḥ al-Qawāʿid*, n. 3, p. 429.

[26] *The Mejelle* no. 10, (Art. 16).

[27] Cf. al-Barikati, *Qawāʿid al-Fiqh*, n. 7, p. 56.

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A Brief History of Legal Maxims

Historically, the Hanafi jurists were the first to formulate legal maxims. An early Iraqi jurist, Sufyān Ibn Ṭāhir al-Dabbās al-Qāḍi, a contemporary of al-Karkhi, collated the first seventeen maxims, and Abu al-Ḥassan ʿUbayd Allah Ibn al-Husayn al-Karkhi (d. 340/952) increased this to 39. Al-Karkhi's work, entitled *Uṣūl al-Karkhi*, is regarded as an authoritative precursor on the subject among the Hanafis, although some scholars regard it as a work in the genre of *uṣūl al-fiqh*—as might have been suggested by its title. A more relevant explanation for that title was probably the fact that every one of the 39 legal maxims in it was identified as an *aṣl* (pl. *uṣūl*). To avoid ambiguity in the use of this term, it will be noted that *aṣl* carries three meanings: 1) a source of law; 2) a legal principle that covers numerous individual cases; 3) an act that has already been determined and now serves as a model for similar cases. Whereas the basic corpus of *fiqh* and *uṣūl al-fiqh* were developed in roughly the first four centuries of Islam, a marked resurgence of interest in the *qawāʿid* is noted from the eight century A.H. onward, which ushered in the ulama efforts to extract general rules by way of induction from the legal manuals of the *madhāhib*. Al-Karkhi's collection began by recording the first *aṣl* (norm): "What is proven with certainty may not be overruled by doubt", and it ended with the *aṣl* that "explanation to a speech is credible for as long as it is given at a time when it can be considered valid, but not otherwise" (*al-aṣlu ann'l-bayān yuʿtabaru bil-ibtidā', in saḥḥa al-ibtidā', wa illā fa-lā*). This may be illustrated as follows: suppose a man divorces two of his wives in a single pronouncement and address such as: "you are both divorced." Later, he elaborates that he only meant that one of them be divorced by triple *ṭalāq*. This explanation will be credible only during the probation period of *ʿidda*, but it will not carry any weight if it is given after that period.[28] Some of the early maxims that were compiled also included the following: "The norm is that the affairs of Muslims are presumed to be upright and good unless the opposite emerges to be the case". What it means is that acts, transactions, and relations among people should not be given a negative interpretation that verges on suspicion and mistrust, unless there is evidence to suggest the opposite.

[28] Al-Barikati, *Qawāʿid al-Fiqh*, n. 7, p. 65; see also Abd al-Wahhab Ibrahim Abu Sylayman. *Kitābat al-Bahth al-ʿIlmi Wa Maṣādir al-Dirasat al-Fiqhiyya*, Jeddah: Dar al-Shuruq, 1403/1983, vol. 2, p. 652.

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Another maxim has it that "question and answer proceed on that which is widespread and common and not on what is unfamiliar and rare". Once again, if we were to interpret a speech and enquire into its implications, we should proceed on that which is widespread and commonly understood, as opposed to what might be said to be a rare understanding and interpretation. Another maxim, to which a reference has already been made, has it that "prevention of harm takes priority over the attraction of benefit" (*dur' al-mafāsid awlā min jalb al-manāfiʿ*). The earliest collection of maxims also included the five leading maxims that were discussed above.[29]

Al-Karkhi's collection, which is one of the earliest on record, is not necessarily articulated in the incisive and eloquent style that is typically associated with maxims.[30] Many scholars from various schools added to these over time, and the total number of *qawāʿid* and *ḍawābit* eventually exceeded 1200.

Next to the Hanafis, the Shāfiʿis, and then following them, the Hanbalis, then the Mālikis, in this order, as al-Zarqā has noted, added their contributions to the literature on legal maxims. The leading Shāfiʿi scholar, ʿIzz al-Dīn ʿAbd al-Sulami's (d. 660/1262), *Qawāʿid al-Ahkām fi Maṣāli al-Anām*, is noted as one of the salient contributions to this field, and so is ʿAbd al-Raḥmān ibn Rajab al-Hanbali's (d. 795/1393) work *Taqrīr Al-Qawāʿid wa Taḥrīr al-Fawā'id*, both of which have been highly acclaimed. Yet, in terms of conciseness and style, the *Mejelle Ahkam Adliyye*, an Islamic law code, written by a group of Turkish scholars under the supervision of Ahmed Cevdet Pasha (d. 1895) the then Minister of Justice in the 1870s, is said to represent the most advanced stage in the compilation of legal maxims. The introductory section of the *Mejelle* only records ninety-nine legal maxims, which have in turn been elaborated in many other works. One such work was authored by Muhammad al-Zarqā, bearing the title *Sharḥ al-Qawāʿid al-Fiqhiyya* (1403/1983). The son of this author, and also his commentator, Muṣtafā al-Zarqā, has noted, however, that the *Mejelle* selection does not necessarily represent a self-contained collection of all the leading maxims. Whereas many fall in that category, there are some which are decidedly subsidiary. The *Mejelle* selection is also not systematic, in that maxims which relate to one another do not appear in clusters, but tend to appear on a stand-alone kind of arrangement.[31]

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[29] Cf. al-Brikati, *Qawāʿid al-Fiqh*, n. 7, p. 56.
[30] Cf. ʿAtiyya, *al-Tanzīr*, n. 13, p. 18; sabuni, *al-Madkhal*, n. 2, p. 387.
[31] Cf. Zarqā, *Sharḥ al-Qawāʿid*, n. 3, pp. 43-44.

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The development of this branch of *fiqh* is in many ways related to the general awareness of the ulama over the somewhat piecemeal and fragmented style of the *fiqh* literature which, somewhat like the Roman juristic writings, is on the whole issue-oriented, and short of theoretical exposition of the governing principles. This is related, in turn, to the fact that *fiqh* was mainly developed by private jurists who were not acting on behalf of governments and institutions that might have exerted a unifying influence. They wrote often in response to issues as and when encountered, and we consequently note that theoretical abstraction was not a well-developed feature of their works. The legal maxims filled that gap to some extent, and provided a set of general guidelines in an otherwise diverse discipline that combined an impressive variety of schools and influences into its fold.

Islamic jurisprudence is also textualist, as it is guided by the textual injunctions of the Qur'ān and Sunnah. In developing the law, the jurists have shown the tendency to confine the range of their expositions to the given terms of the text. The theoretical generalisation of ideas was generally viewed with caution vis-à-vis the overriding authority of the text, and attention was focused on the correct interpretation of the text, rather than on developing general theories. Questions are being asked to this day whether Islamic law has a constitutional theory, a theory of contract, or a theory of ownership.

It is only in recent times that Muslim scholars began to write concise, yet self-contained, expositions of the law in these areas, as I shall presently explain, but first, I turn to *al-ashbāh wa'l-naẓā'ir*.

Resemblances and Similitudes (al-Ashbāh wa'l-Naẓā'ir)

This genre of literature emerged in the writings of the ulama well after the formation of the *madhāhib*. The term evidently originated in the renowned letter of the Caliph 'Umar al-Khaṭṭāb addressed to judge Abū Mūsa al-Ash'ari of Baṣra in which the latter was instructed to "ascertain resemblances and similitudes and adduce matters to their likes in giving judgment". The term *al-ashbāh wa'l-naẓā'ir* was later chosen by Tāj al-Dīn al-Subki, who wrote an important work on legal maxims, as the title of that book. Jalāl al-Dīn al-Suyuṭi (d. 911/1505) and Zayn al-'ābidin Ibn Nujaym al-Hanafi (d. 970/1563) also wrote works that closely resembled one another, both bearing the title *al-ashbāh wa'l-naẓā'ir*; they relied mainly

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on al-Subki's writings, with certain modifications that were reflective, perhaps, of their respective scholastic orientations. At the beginning of every maxim that he discussed, Al-Suyuṭi identified the source evidence from which the maxim was derived and then added illustration and analysis. Al-Suyuṭi devoted the first chapter of his *al-Ashbāh wa'l-Naẓā'ir* to the five leading maxims, and the *fiqhi* issues to which they applied. Then he discussed, in the second chapter, forty other maxims of a more specific type that are derived from the first five. Another chapter in that work is devoted to a selection of the most useful and recurrent maxims in the works of *fiqh*, and yet another chapter discussed maxims on which the jurists were in disagreement. The next two chapters in al-Suyuṭi's work put together clusters of maxims that related to one another, and those that resembled one another in some way. The last chapter added miscellaneous maxims that are not classified in any manner.[32]

Some of the leading maxims that al-Suyuṭi recorded were: "private authority is stronger than public authority" (*al-wilāya al-khāṣṣa aqwa min al-wilāya al-ʿamma*),[33] which evidently means that the authority, for example, of the parent and guardian over the child is stronger than that of the ruler and the judge; another maxim thus declared "no speech is attributed to one who has remained silent" (*lā-yunasb li'l-sākit qawl*).[34] And, we read in yet another maxim "the attachment follows the principal" (*al-tābiʿ tābiʿ*), which obviously means that, in reference, for example, to contracts and transactions, things which belong to one another may not be separated: one does not sell a yet-to-be born animal separately from its mother, or a living room separately from the house.[35]

Ibn Nujaym divided the legal maxims into two categories of normative or leading maxims, and subsidiary maxims. He only placed six under the former, and nineteen under the latter, but discussed a number of other subsidiary rules and maxims of *fiqh* in his detailed elaboration and analysis. The sixth leading maxim of Ibn Nujaym that he added to the familiar five, as reviewed above, was that "no spiritual reward accrues without intention" (*lā thawāb illā bi'l-niyya*), which is why the ritual prayer, and most other acts of devotion, are preceded by a statement of intention, or *niyya*.[36] The introductory part of the Ottoman *Mejelle*, compiled

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[32] Cf. Abu-Sulaymān, *Kitābat al-Baḥth al-ʿIlmi*, n. 28, vol. 2, p. 677.
[33] *The Mejelle* n. 10, (Art. 58).
[34] Id., (Art. 66).
[35] Id., (Art. 47). See also Zarqā, *Sharh al-Qawāʿid*. n. 3, p. 253.
[36] Zayn al-ʿAbidin Ibrahim Ibn Nujaym, *al-Ashbāh wa'l-Naẓā'ir*, ed. ʿAbd al-ʿAziz Muhammad al-Wakil, Cairo: Mu'assasa al-Halabi li'l-Nashr wa'l-Tawziʿ, 1387/1968, p. 67f.

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in the 1870s, which contains ninety-nine legal maxims, was mainly derived from *Al-Ashbāh Wa'l-Naẓā'ir of Ibn Nujaym.*

Despite the general tendency in legal maxims to be inter-scholastic, jurists and schools are not unanimous on all of them, but the differences between schools in this area are not very wide. The Jaʿfari school of Shīʿa has its own collection of legal maxims, yet, notwithstanding some differences of style, the thematic arrangement of the Shiʿi collection resembles closely to those of their Sunni counterparts. The first Shiʿi work on maxims was that of ʿAllāma Ibn Muṭahhar al-Ḥilli (d. 771/1369), entitled *Al-Qawāʿid*, followed by al-Shahīd al-Awwal Shams al-Din al-ʿĀmili's (d. 782/1389) *Al-Qawāʿid wa'l-Fawā'id*, which compiled over 300 maxims, and many more works that elaborated and enhanced the earlier ones. The more recent work of Muhammad al-Husayn Kāshif al-Ghiṭā', bearing the title *Taḥrīr al-Mujalla*, is an abridgment and commentary on the Ottoman *Mejelle.* In this work, the author has commented on the first 99 articles of the *Mejelle*, out of which he selected 45 as being the most important in the range, and the rest he found to be overlapping and convergent or obscure, but he added 82 others to make up a total 127 maxims of current application and relevance, especially to transactions and contracts. Al-Ghiṭā' went on to say, however, that "if we were to recount all the maxims that are referred to in the various chapters of *fiqh*, we can add up to five hundred or more."[37]

The Discordances (al-Furūq)

Other developments of interest in the *fiqh* literature that relate to the *qawāʿid* are the discordances (*al-furūq*), which occur in almost the opposite direction to that of *al-ashbāh wa'-naẓā'ir.* As the word indicates, the *furūq* highlights differences between seemingly similar concepts, or those which have an aspect in common. The attempt to highlight such differences in the substantive *juris corpus* of *fiqh* was also extended to the maxims, in that the *furūq* literature specified the differences between some of the maxims that resembled one another, but could subtly be distinguished in some respect. The Māliki jurist Shihāb al-Dīn Ahmad b. Idrīs al-Qarafi's (d. 682/1281) *Kītāb al-Furūq* has discussed 548 maxims, and 274 differences

[37] Muhammad al-Husayn Kāshif al-Ghiṭā, *Taḥrīr al-Mujalla*, Najaf, 1359, p. 63; Jamal al-Din ʿAtiyya, *al-Tanzīr al-Fiqhi*, n. 13, p. 1407/1987, p. 75; Ṣābuni, *Madkhal*, n. 5, p. 39.

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(*furūq*) in this light, and it focuses on distinctions and differences between similar themes and ideas. Occasionally the word *qawāʿid* is used in reference to what is a *ḍābiṭa* or even a specific ruling of *fiqh*. Al-Qarāfi often poses questions as to the differences between two maxims that address similar themes but which involve subtle variations. He also explains the subjects of his enquiry by referring to their opposites, as he believes that this is often a very effective way of highlighting the merits or demerits of particular ideas and maxims. His work is generally regarded as one of the best in the field.[38] Al-Zarqā has noted, however, that *al-Furūq* is not, strictly speaking, confined to legal maxims. This is because the book is dominated by comparisons and contrasts, and engages in the explanation of basic *fiqh* themes and issues in a way that almost puts the work in the general category of *fiqh*, rather than the maxims of *fiqh*, which is a separate branch of *fiqh* in its own right.[39]

Examples of the *furūq* includes the distinctions between *ijārah* and sale, between custody (*ḥaḍānah*) and guardianship (*wilāyah*), between testimony (*shahāda*) and narration (*riwāyah*), between verbal custom and actual custom (*al-ʿurf al-qawli, al-ʿurf al-fiʿli*) and so forth; these are often expressed in rule-like statements that generally resemble *ḍābiṭas*, as they apply to specific themes, but named *al-furūq*, as they usually compare similar themes, and highlight the differences between them. Al-Qarafi's approach represented a new development in the *qawāʿid* literature. He has also discussed legal maxims in his other works, namely *Al-Dhakhīra*, but more specifically in *Al-Iḥkām fi Tamyīz al-Fatāwa ʿan al-Aḥkām*. This title itself is, it may be noted, *furūq*-oriented, as it refers to differences between *fatāwa* and judicial decisions. Ibn al-Shāṭ Qāsim bin ʿAbd Allah al-Anṣari's (d. 723/1323) work, *Idrār al-Shurūq ʿalā Anwār al-Furūq* is also a work on *furūq*, and smaller works of similar kind were also written by some Sḥāfiʿi scholars.[40]

Theories of Fiqh (Naẓariyyāt al-Fiqhiyya) *and Encyclopedias*

The next development that may briefly be explained is relatively recent, and appears in the modern writings of *fiqh* under the general designation *al-naẓariyyāt al-fiqhhiyya*, or legal theories of *fiqh*. *Naẓariyya* in this context implies a self-contained and comprehensive treatment of an important

[38] Cf. Abu-Sulaymān, *Kitābat al-Baḥth*, n. 8, vol. II, p. 660.
[39] Zarqā, *Sharḥ al-Qawāʿid*, n. 3, p. 42.
[40] See for details ʿAtiyya, *al-Tanẓīr*, n. 13, pp. 131-32.

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area of the law, such as *nazariyyat al-ḍarūra* (theory of necessity), *nazariyyat al-milkiyyah* (theory of ownership), *nazariyyat al-ʿaqd* (theory of contract), and so forth. This level of theoretical development marks a departure from the earlier style of juristic writing in *fiqh*, where topics were poorly classified, and themes pertaining to a particular area were scattered in different places. The *nazariyyāt* literature seeks to overcome that, and offer a systematic treatment of its subject matter that aims to be self-contained and convenient to use.

The *nazariyyāt* literature draws upon the combined resources of *fiqh* in all areas, including the *qawāʿid*, the *ḍawābiṭ* and the *furūq*. Yet, the *nazariyyāt* are usually not expected to reproduce the detailed formulation of these related branches, as theory-oriented works generally seek to be concise, and clear of repetition and unnecessary detail; it also incorporates new methods of writing and research which are more effective and less time-consuming.

The *nazariyyāt* literature not only aims at improved forms and methods of writing, but often seeks to advance and develop some of the substantive aspects of the *fiqh* doctrines. With regard to the law of contract, for example, ʿAbd al-Razzāq al-Sanhūri (d. 1969) has observed that the *fiqh* literature in this area is focused on the detailed exposition of a number of nominate contracts, and treats each contract separately. The Hanafi jurist ʿAlauddīn al-Kāsāni (d. 589/1198) has thus dealt with nineteen nominate contracts, many of which have aspects in common, and, of course, they also differ in other respects. A perusal of the relevant literature of *fiqh* on contracts, al-Sanhuri noted, leaves the reader questioning (a), whether these could all be consolidated in order to highlight the features they all have in common; (b), whether the *fiqh* validates contracts other than these; and (c), whether the *fiqh* recognises the basic freedom of contract on the basis merely of an agreement which does not violate morality and public interest.[41] Questions of this nature are likely to be addressed in the *nazariyyāt* literature, which is better consolidated, and encompasses salient developments of interest to the subject.

The *nazariyyāt* literature is not entirely without precedent in the *fiqh* works. With reference to the theory of contract, for example, we may note that significant progress had been made by the Hanbali ulama, Ibn Taymiyya (d. 728/1348) and his disciple, Ibn Qayyim al-Jawziyya, whose

[41] ʿAbd al-Razzaq al-Sanhuri, *Maṣādir al-Ḥaq fi'l Fiqh al-Islami*, Cairo: *Maʿhad al-Buḥūth wa'l Dirāsāt al-ʿArabiyya*, 167, vol. 1, p. 78. see also Ṣābuni, *Madkhal*, n. 5, p. 380.

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contributions are widely acknowledged. Ibn Taymiyya effectively departed from the earlier strictures over the nominate contracts, and advanced a convincing discourse, through his own reading of the source evidence, that contracts need not be confined to a particular prototype or number.[42] The essence of all contracts is manifested in the agreement of the contracting parties, who may create new contracts, within or outside the ones that are already known, provided that they serve a lawful benefit and do not violate public policy and morals. It may be noted, however, that Ibn Taymiyya's contribution to the theory of contract represented rather a late development and a departure, in many ways, from the majority position on this theme, which is why al-Sanhuri's critique may still be considered relevant. Ibn Taymiyya also wrote a book on legal maxims entitled, *al-Qawā'id al-Nurāniyya*, which treats the subject in an interesting way by looking at the legal maxims under the main chapters of *fiqh*. The book thus devotes sections to cleanliness (*al-ṭahāra*), prayers, *zakah*, fasting, the hajj, and then to contracts and financial transactions, followed by sections on matrimony, etc., and discusses the relevant legal maxims under each heading. These are followed in each part by subsidiary rules (*dawābiṭ*) and disagreements, if any, that may exist concerning them, as well as the author's own views and suggested solutions to such disagreements.[43]

To pursue our discussion of the *naẓariyyāt*, it may be added that considerable progress has been made, in the sphere of *naẓariyyāt* literature, not only in al-Sanhuri's writings, but by numerous other scholars, both Arab and non-Arab, who have written widely on contracts and other major themes of *fiqh*.

Many works in this category are now available on various topics of *fiqh*, bearing such titles as *Naẓariyyat al-Ithbāt fi'l-Fiqh al-Islami* (standards of proof, or the theory of proof, in Islamic law), *Naẓariyyat al-Milkiyya* (theory of ownership), *Naẓariyyat al-'Aqd* (theory of contract), and so forth. Works of recent origin on the constitutional theory that offer self-contained expositions of the subject bear such alternative titles as *Niẓam al-Ḥukm fi'l-Islam* (the Islamic system of government), and *Uṣūl al-Ḥukm fi'l-Islam* (principles of government in Islam), which are, in fact, the more recent variations of the genre of literature that appeared under the general heading *al-Aḥkam al-Sulṭāniyya*. The choice and wording of title usually gives some indication as to the scope and relevance of the work to *naẓariyyāt*.

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[42] Much to his credit, the manual that Ibn Taymiyya wrote on the subject actually bore the title *Naẓariyyat al-'Aqd* (Theory of Contract).

[43] Cf. Abu-Sulaymān, *Kitābat al-Baḥth*, n. 28, vol. II, p. 678.

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One should also note, in this context, the emergence of the encyclopedias of *fiqh* in the latter part of the twentieth century, which marked a milestone of development, and succeeded in producing consolidated and reliable works of reference on *fiqh*, and these efforts are still continuing. A number of *fiqh* encyclopedias have been published bearing the familiar title *al-mawsuʿa al-fiqhiyya*. Egypt, Kuwait, Syria and other countries embarked on compiling encyclopedic works on *fiqh* during the latter part of the 20th Century. The Kuwait Encyclopedia of *fiqh* started in late 1970's, has to date been published in over 40 volumes, and is nearing completion. The Egyptian counterpart on this started earlier, in the 1950's, and that, too, has appeared in over 30 volumes. Syria's started at around the same time as Egypt's, but it was not as extensive. The one that is published by the Ministry of Awqaf of Kuwait is more systematic, and easier to use. Almost all the alphabetical *fiqh* titles are treated under the doctrines, not only of the four Sunni schools, but also of the Shīʿah, the Zahiriyya, the Ibādiyya, and others. Numerous other *fiqh* encyclopedias, of more limited scope, have been published by private institutions and individuals.

The encyclopedia coverage of *fiqh* subjects and titles bears similarity to the *nazariyyāt* format in most cases, although the approach here differs in some ways from that of self-contained theoretical works of textbook orientation . To give an example, the article on *ḥaqq* (right) in the *fiqh* encyclopedia of Kuwait is extensive, and in itself provides a condensed exposition of the theory of *ḥaqq* in Islamic law. This can also be said of *wilāya* (guardianship), *nikāḥ* (matrimony), and so many other entries. Yet, it will be noted that the encyclopedia coverage of *fiqh* themes can be somewhat atomistic, in that the overall focus tends to be on individual topics, rather than a progressive and coherent development of particular areas of *fiqh*.

As a distinctive genre of *fiqh* literature, the legal maxims are likely to remain an influential area of the legacy of *fiqh*. This is perhaps borne out by the fact that the Turkish ulama who drafted the Ottoman *Mejelle*, in 1850 articles, decided to begin their impressive, and in many ways, original, work on the Islamic law of transactions with a selection of the most important of these maxims.

Conclusion

It is the abstract and synoptic character of legal maxims that gives them a degree of versatility and timelessness that is not hampered by burdensome detail. The inherent objectivity of legal maxims contributes to their

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continuity, which would account for the fact that there have been no significant additions to the early compilations of legal maxims. Having said this, one may agree that substantive reforms of the *fiqh*, or major developments of concern to *uṣūl al-fiqh*, may also, to some extent, have to be reflected in the legal maxims. On the subject of *ijtihād*, for example, the basic idea of statutory legislation whereby the elected assembly and parliament, rather than the *mujtahid*, or the general consensus (*ijmāʿ*) of *mujtahids*, has become the principal mode of law making in the present day Muslim countries. This development has not been contemplated with all its ramifications in the legal theory of *uṣūl al-fiqh*. Now that the statute book has assumed a near-total control of legislation in the Muslim counties, some aspects of the theory of *ijtihād* may also need to be reviewed. For instance, *ijtihād* used to be seen as a preserve of the individual scholar and *mujtahid*, but the view has gained ground nowadays that collective *ijtihād* (*ijtihād jamāʿi*) should now be recognised. Some of the legal maxims concerning *ijtihād* may consequently call for adjustment. The present writer has elsewhere discussed this in detail, but we may note here a legal maxim, for example, that "*ijtihād* is not valid in the presence of *naṣṣ* (clear injunction)". Yet, there may be a *naṣṣ* that can hardly be implemented without substantial *ijtihād* concerning it. The issue one faces may be such that a *naṣṣ*, such as the ones concerning the punishments of adultery and theft, could either be marginalized or read side by side with *ijtihād* to ascertain how best they can be implemented. Without wishing to enter details, one can imagine that *ijtihād* may well operate in the presence of a *naṣṣ* so as to explain the *naṣṣ* in the light of new realities. Moreover, the *ijtihād* that is now undertaken may be guided, not so much by the specificity of *naṣṣ*, but by the overall purpose of that *naṣṣ* within the wider framework of the goals and purposes, or *maqāṣid*, of Sharīʿa. This can also be said with regard to another maxim on *ijtihād*, which provides that "*ijtihād* may not be overruled by its equivalent".[44] Some of the legal maxims concerning evidence and proof, especially relating to circumstantial evidence, may also call for adjustment as a result of the availability of reliable methods of proof, such as photography and sound recording, DNA analysis and the like, which did not exist in earlier times. Yet, notwithstanding all of these developments, one still notes a remarkable degree of continuity in the substantive themes of legal maxims.

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[44] See for further detail Mohammad Hashim Kamali. *Punishment in Islamic Law: An Enquiry into the Hudud Bill of Kelantan*, Kuala Lumpur, 'Ilmiah Publishers, 2000, 23ff.

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Further related to our discussion on the prevalence of statutory legislation, it will be noted that statutory codes have now partially assumed the role that was earlier played by legal maxims. The language and style of statutory legislation show a striking similarity to that of legal maxims, as both tend to be concise, devoid of details, illustration, and ratiocination. What could earlier be said in a legal maxim can now be said in the text of a constitution, a civil code, or other statutes. Yet, it still remains to be said that legal maxims and statutes are not substitutes for one another. Legal maxims can play a supplementary role to substantiate legislation in the Sharīʿa-dominated fields, such as personal law and civil transactions.

The Sharīʿa law of personal status continues to be the applied law of most Muslim countries, and the development, more recently, of Islamic banking and finance has also witnessed a revival of the Sharīʿa law of *muʿāmalāt.* For purposes of better understanding and consolidation of important *fiqh* concepts with statutory laws, we may propose that legal maxims which relate to these and other applied areas of the Sharīʿa should be clustered together and added as an appendix, introduction, or explanatory memorandum to the relevant statutes, and thus given a role in matters of interpretation and enforcement in the courts of justice. This will help to provide judges and lawyers with a convenient reference to relevant legal maxims—just as it can give the readers a convenient lead into important *fiqh* concepts. What is proposed here is also likely, in the long run, to contribute toward greater harmonisation and uniformity of the Sharīʿa and civil law, itself an objective which is actively pursued in many Muslim countries, including Malaysia.[45]

[45] For further details on harmonisation, see M.H. Kamali, "Harmonisation of Sharīʿah and Civil Law: The Framework and Modus Operandi," *IIUM Law Journal* 11 (2003), 149-169; Idem, "Sharīʿah and Civil Law: Toward a Methodology of Harmonisation," *Islamic Law and Society* (forthcoming).

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